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IN THE

Supreme Court of the United States

No. ~~1570~~ 70-121

October Term, 1970

RUFUS LEE JR.,

Petitioner,

vs.

COUNTY COURT OF THE COUNTY OF ERIE, HON. ERNEST L. COLUCCI, Individually and as a Judge thereof, and MICHAEL F. DILLON, District Attorney of Erie County,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Opinion Below

The opinions of the New York State Court of Appeals are reported at 27 N. Y. 2d 432. The decision of the New York Court of Appeals modifies and affirms, as modified, the decision of the Supreme Court, Appellate Division, Fourth Judicial Department whose opinion is reported at 33 A. D. 2d 1093.

Jurisdiction

The petitioner, while invoking the jurisdiction of this Court under the provisions of 28 U. S. C. 1257(3), has failed to demonstrate that his due process claims, relating to Section 658 of the New York Code of Criminal Procedure (C. C. P. Sec. 658), either exist or are in such a stage as would jurisdictionally permit this Court to review the matter as a judgment which is "*final*".

The decision of the Appellate Division herein clearly directed that a new psychiatric examination be held without counsel present. Although the Court of Appeals properly modified that order to allow for the presence of counsel, it clearly affirmed the direction of an examination. No trial has yet been had.

It is therefore respectfully urged by the Respondents that an order directing a psychiatric examination is merely an interlocutory order, and clearly not a "*final*" judgment reviewable at this time and in this manner. *Gospel Army v. City of Los Angeles, Cal.*, 331 U. S. 543, 67 S. Ct. 1428 (1947); *Arceneaux v. State of Louisiana*, 376 U. S. 336, 84 S. Ct. 777 (1964). See also *Whitus v. State of Georgia*, 385 U. S. 545, 87 S. Ct. 643 (1967); *Cobbledick v. United States*, 309 U. S. 323, 60 S. Ct. 540 (1940); *St. Louis, Iron Mountain and Southern R. Co. v. Southern Express Co.*, 108 U. S. 24, 2 S. Ct. 6 (1883); *Berman v. United States*, 302 U. S. 211, 58 S. Ct. 164 (1937).

Nor is this case one wherein the trial court, in view of the Court of Appeals direction, has nothing more to do than go through the formalities of finding the petitioner guilty. The psychiatrists, should the petitioner cooperate, might very well conclude that he was legally irresponsible

for his actions thereby rendering his prosecution an impossibility. *Mills v. State of Alabama,* 384 U. S. 214, 86 S. Ct. 1434 (1966); *Cohen v. Beneficial Industrial Loan Corp.,* 337 U. S. 541, 69 S. Ct. 1221 (1949).

In an effort, therefore, to insure the time honored approach of this Court not to decide interlocutory matters (thereby avoiding piece-meal review), it is urged that the Court dismiss the writ as not within its jurisdiction. *Parr v. United States,* 351 U. S. 513, 76 S. Ct. 912 (1956); *Heike v. United States,* 217 U. S. 423, 30 S. Ct. 539 (1910).

Questions Presented

Although the questions presented as they appear in petitioner's brief are acceptable under the factual circumstances herein, respondent suggests that the following more adequately frame the issues.

1. Where insanity will be a defense at a criminal trial, is a defendant's right against self-incrimination violated by compelling the defendant to give pre-trial testimonial responses to psychiatrists appointed by the court upon the request of the prosecution?

2. Does the action of the courts of New York in ordering a defendant in a capital case to give testimonial responses to court appointed psychiatrists or lose the right to present psychiatric evidence at the trial violate a defendant's right to due process?

Statement of the Case

The respondent adopts the statement of the petitioner set forth at pages three through five of his brief.

Argument

If the petitioner is allowed to put in issue his mental responsibility at the time of the criminal act, and simultaneously is not compelled to answer questions of the court ordered psychiatrists, such a defense would in almost all cases be insurmountable as a matter of law. The law in New York compels such a result since once the defense is raised by a defendant, it is the duty of the prosecution to establish the sanity of the defendant beyond a reasonable doubt. A duty has also been judicially imposed upon the prosecution to insure that a proper pre-trial medical examination is secured whenever it has reason to believe that the accused's state of mind will be an issue at the trial. *Winn v. U. S.*, 270 F. 2d 326, cert. den. 365 U. S. 848.

In the absence of such an examination, to rebut defendant's proof of insanity, the People would be forced to rely, as was suggested below by petitioner, upon cross examination of defense experts, upon lay testimony if such were available, and upon the testimony of experts predicated on court room observations and hypothetical questions. These are certainly poor substitutes for testimony based upon extensive interviews between the psychiatrist and the defendant. As was observed by the court in *United States v. Albright*, 388 F. 2d 719 at 725 of the opinion, "Half truths derived from these unsatisfactory substitutes do more to violate human personality than full disclosure, especially because there is always the possibility that the psychiatrist who examines for the government, and thus has full knowledge of the defendant, may corroborate his contention that he is legally insane."

The order of the Court below directing the psychiatric examination herein, specifically provided that the appointed doctors determine the mental condition of the defendant

at the time of the act in question. Neither can there be a question herein as to the intended use of the examination by the prosecution. The affidavit of the assistant prosecutor, in support of the motion seeking the order of examination, clearly assured the defendant and the Court that the prosecution did not intend to offer any of the defendant's answers into evidence. Such an examination, for such a limited purpose, does not violate his privilege against self-incrimination. *United States v. Baird,* 414 F. 2d 700 (1969); *United States v. Albright,* 388 F. 2d 719 (1968); *People v. DiPiazza,* 24 N. Y. 2d 342.

Petitioner argues, also, that his due-process rights are violated when his constitutional rights to plead not guilty by reason of insanity is conditioned upon a relinquishment of his Fifth Amendment privilege against self-incrimination. Such an argument presumes, however, that the right of a defendant to introduce expert psychiatric opinion evidence, based upon an after-the-act interviews with the defendant, is constitutionally guaranteed. This simply is not so. *United States v. Baird, supra,* 414 F. 2d at 712. Such an argument also presumes that compliance in the examination would be self-incriminatory. However where the examination is intended to (and indeed limited to) elicit information regarding a defendant's mental capacity so as to determine his criminal responsibility for his actions, as distinguished from whether he in fact committed the act, the privilege against self-incrimination is not violated. See *United States v. Albright, supra.*

The petition suggests that he was willing to cooperate to a certain extent with the court-appointed psychiatrists by giving them access to his prior medical records and the benefit of reading the psychiatric testimony from a previous trial. His offer however falls far short of the prerequisite

cooperation of the petitioner deemed necessary by the examining psychiatrists. As was so aptly pointed out by the New York Court of Appeals in its decision herein, in referring to the case of *People v. Esposito,* 287 N. Y. 389, "Courts, under the circumstances presented here, may not control the methods which have been determined by the medical profession to be proper means for discovering or treating mental diseases".

The court-appointed psychiatrists herein, have indeed reported to the Court that without the cooperation of the petitioner, in those areas wherein he has refused to cooperate, it is medically impossible for them to render an opinion as to his mental responsibility at the time of the criminal act.

Furthermore, the invocation by the petitioner of the privilege against self-incrimination is not well taken since it must be presumed that he has given all of the information to the defense psychiatrists which he has refused to give to the court-appointed psychiatrists. Hopefully what justice is seeking is the truth, and not surprise on behalf of either party. To uphold the invoking of the privilege in such a case as this would in effect be allowing the privilege to be used not as a shield, but as a sword. This would indeed be a distortion of the Fifth Amendment.

Petitioner suggests that the prosecution has examined the defendant prior to his first trial, and that simply because his first conviction was reversed, the People "cannot have another bite of the apple".

There are two answers to such an argument. The first is that the order directing the original examination was limited to a determination of defendant's capacity to stand trial. Secondly, in view of the reversal, the People have a

duty to make inquiry into the defendant's state of mind at the time of the alleged act, knowing that it will be an issue at the retrial. See *Winn v. United States*, 270 F. 2d 326, 327, cert. den. 365 U. S. 848; *People v. DiPiazza, supra.*

Identical questions, to those considered herein have been considered recently by this Court in the case of *Parkin v. Florida*, 8 Cr. L. 4183 (March 24, 1971) wherein the Court denied certiorari. In the *Parkin* case the Florida court conditioned the right to offer *any* evidence at trial on the issue of insanity upon petitioner's cooperation with court-appointed psychiatrists. The New York Court has conditioned the offer of only psychiatric evidence upon such cooperation. This approach seems much less harsh.

The decision of the New York Court of Appeals makes it clear that the privilege against self-incrimination exists and obtains at a pretrial psychiatric examination of the defendant. However, it is their view that where the defense is insanity, a defendant cannot remove the only source of information from which to find mental responsibility, that is his own thoughts. On the other hand, "It would violate judicial common sense to permit a defendant to invoke the defense of insanity and foreclose the government from the benefit of a mental examination to meet this issue". *Alexander v. United States*, 380 F. 2d 33, at page 39 (1967); *United States v. Weisser*, 428 F. 2d 932 (1969); *Pope v. United States*, 373 F. 2d 710 (1967); *Battle v. Cameron*, 260 F. Supp. 804 (1966); *United States v. Driscoll*, 399 F. 2d 135 (1968).

Conclusion

Respondent respectfully submits that compelling the petitioner to cooperate with court-appointed psychiatrists, pursuant to his plea of insanity in no way violates his constitutional rights, either state or federal.

In any event, the writ should be dismissed since it is directed against a *non* "final" intermediate order in a criminal proceeding that has not yet gone to trial, let alone "judgment".

Respectfully submitted,

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